

0019 3095 07 (Nov. 30, 2016) – Because the employer did not proffer any offer for the next academic year until mid-July, G.L. c. 151A, § 28A may not disqualify the claimant from receiving benefits until that point. The claimant then declined the offer. DUA treats rejecting an offer of employment as a separation for purposes of eligibility for benefits. Therefore, § 28A does not render the claimant ineligible for the rest of the summer. DUA will adjudicate whether the claimant remained in unemployment after mid-July under a different section of law.

Board of Review
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Issue ID: 0019 3095 07

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA), to deny unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and we affirm in part and reverse in part.

The claimant separated from her position with the employer on June 22, 2016. She filed a claim for unemployment benefits with the DUA, which was approved for the period beginning July 17, 2016, in a determination issued on August 3, 2016. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner modified the agency's initial determination in a decision rendered on August 31, 2016. The examiner awarded benefits from July 3, 2016, through July 16, 2016, and denied benefits from July 17, 2016, through September 3, 2016. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the employer had provided reasonable assurance of re-employment for the subsequent academic year, and, thus, the claimant was disqualified, under G.L. c. 151A, § 28A, beginning the week of July 17, 2016. Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal.

The issue before the Board is whether the review examiner's conclusion that the claimant became ineligible for benefits, under G.L. c. 151A, § 28A, upon receiving the employer's July 21, 2016, offer of a full-time teaching position for the 2016–2017 academic year is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

The review examiner's findings of fact and credibility assessments are set forth below in their entirety:

1. The claimant filed an unemployment claim which was effective on July [3], 2016.
2. The claimant worked for the employer most recently from August 28, 2015, until June 22, 2016.
3. The claimant stopped working on June 22, 2016, because the school year ended on that day.
4. Throughout her employment, the claimant worked for the employer as a special education teacher at the employer's high school.
5. Until the school year beginning in September 2015 and ending on June 22, 2016, the claimant was employed full-time.
6. During the 2015–2016 school year, the claimant worked part-time at her request. The claimant requested part-time work because her husband was diagnosed with a serious chronic medical condition and due to this, the claimant had child care issues.
7. On June 24, 2016, the employer notified the claimant that her part-time position as a special education teacher would not be available in the upcoming 2016–2017 school year.
8. On July 14, 2016, the employer's Executive Director sent an email message to the claimant in which she stated, "Are you available and interested in returning to the HS FT?"
9. On July 14, 2016, the claimant responded to the Executive Director's email message and stated that although she absolutely loved her position and students at the high school, she felt that one more year part-time would be best for her family. The claimant thanked the Director for allowing her the opportunity to work PT (part-time) during the 2015–2016 school year. The claimant asked the Executive Director to keep her in mind if anything PT came up and she would apply.
10. In the summer of 2015, the claimant applied for a part-time position with the employer; she did not get the job.
11. The Executive Director sent the claimant an email message dated July 21, 2016. The email message stated in part, "I am inquiring about your intent to return to a FT Special Education teacher at [Employer's high school]. Have you connected with [Person A]...or [Person B] regarding your position next year. We are anxious to know if you will be coming back or if you intend to

- resign. Can you please let us know by the end of the day tomorrow (Friday, July 22nd).”
12. On July 25, 2016, the claimant responded by email message to the Executive Director’s email message. In her email message, the claimant stated, “I apologize for this late reply, I was away this weekend. Due to family needs, I am not available to work full-time this year. I will reach out to [Person A] today to let her know. Next year, my youngest will be in kindergarten, and I will be able to resume working full-time. If a part-time position becomes available in the district, I will apply. Do you anticipate there being any more posted?”
 13. The Executive Director responded to the claimant’s July 25 email as follows, “Thank you for your response [Claimant]. Please send us a resignation letter as soon as possible. As you know PT work is not common in teaching roles as the kids here are FT. I do not anticipate any openings this year but if any are needed they will get posted. If your availability for work changes please let us know.”
 14. The claimant never submitted an oral or written resignation to the employer.
 15. On or about August 11, 2016, the claimant requested the employer to place her on an unpaid leave of absence for the 2016–2017 school year.
 16. By letter dated August 15, 2016, the employer notified the claimant that her request for a one-year unpaid leave of absence from her position as a special education teacher at the high school for the 2016–2017 school year had been granted.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the findings are supported by substantial and credible evidence; and (2) whether the review examiner’s ultimate conclusion is free from error of law. Upon such review, the Board adopts the review examiner’s findings of fact and deems them to be supported by substantial and credible evidence. As discussed more fully below, we believe the review examiner correctly concluded that the claimant was not provided with reasonable assurance of re-employment prior to July 21, 2016, but we do not agree that G.L. c. 151A, § 28A, renders the claimant ineligible for benefits during the rest of the summer.

As a school teacher, the review examiner properly considered whether the claimant was eligible for benefits under G.L. c. 151A, § 28A, which states, in relevant part, as follows:

Benefits based on service in employment as defined in subsections (a) and (d) of section four A shall be payable in the same amount, on the same terms and subject to the same conditions as benefits payable on the basis of other service subject to this chapter, except that:

(a) with respect to service performed in an instructional . . . capacity for an educational institution, benefits shall not be paid on the basis of such services for any week commencing during the period between two successive academic years or terms . . . to any individual if such individual performs such services in the first of such academic years or terms and if there is a contract or a reasonable assurance that such individual will perform services in any such capacity for any educational institution in the second of such academic years or terms

The employer has the burden to prove that it has provided reasonable assurance of re-employment, under G.L. c. 151A, § 28A. Board of Review Decision 0016 2670 84 (Jan. 29, 2016).

In her decision, the review examiner concluded that the claimant did not receive reasonable assurance of re-employment for the next academic year before the employer sent her its July 21, 2016, email. However, the review examiner found it was implicit in the employer's July 21, 2016, email message, inquiring whether the claimant intended to return to a full-time teaching position next year or to resign, and, in the claimant's response to that e-mail, that the employer was offering the claimant that position for the 2016–2017 academic year. Up to that point, the record is devoid of any type of offer. The employer's July 14, 2016, email was merely an inquiry about the claimant's availability to teach in the fall. *See* Finding of Fact # 8. An inquiry into availability is not an offer of re-employment. Therefore, we agree with the review examiner that the claimant did not have reasonable assurance of re-employment prior to July 21, 2016.

The claimant's eligibility after this point presents another question. The claimant argues that the review examiner incorrectly concluded that the July 21, 2016, offer constituted reasonable assurance.¹ However, we need not reach that issue, because, early Monday morning of the following week, the claimant declined the employer's offer. *See* Finding of Fact # 12 and Exhibit # 8. For purposes of determining eligibility for unemployment benefits, the DUA treats the claimant's rejection of the job offer as a separation. *See* DUA Service Representative Handbook, § 1556(B). Whether or not the claimant was entitled to benefits from this point forward, therefore, is not governed by G.L. c. 151A, § 28A, but rather by other sections of the statute, which consider whether the claimant was still in unemployment once she turned down this offer of work.²

We, therefore, conclude as a matter of law that the employer failed to satisfy its burden to show that it provided reasonable assurance of re-employment, within the meaning of G.L. c. 151A, § 28A, prior to the week ending July 23, 2016.

¹ In her appeal, the claimant argues that, because the full-time hours of the offered position did not permit the claimant to address her family's child-care needs, it was substantially "less" than her part-time position. *See* the U.S. Department of Labor Unemployment Insurance Program Letter No. 4-87 (Dec. 24, 1986). Traditionally, substantially "less" has been evaluated as a change resulting in reduced economic terms and not measured by whether the offer is deficient in meeting the individual needs of a claimant. *See* the examples contained in UIPL No. 4-87 at 5.

² The DUA's electronic record-keeping system, UI Online, shows that Issue ID # 0019 5908 56, which addresses this question, remains pending at the adjudication level.

The review examiner's decision is affirmed in part and reversed in part. The portion of the review examiner's decision which held that G.L. c. 151A, § 28A, does not disqualify the claimant from receiving benefits from July 3, 2016, through July 16, 2016, is affirmed. The portion of the review examiner's decision which held that G.L. c. 151A, § 28A, disqualifies the claimant from receiving benefits for the period beginning July 17, 2016, through September 3, 2016, is reversed.

The claimant is entitled to receive benefits for the week beginning July 3, 2016, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - November 30, 2016



Paul T. Fitzgerald, Esq.
Chairman



Judith M. Neumann, Esq.
Member

Member Charlene A. Stawicki, Esq. did not participate in this decision.

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT
COURT OR TO THE BOSTON MUNICIPAL COURT
(See Section 42, Chapter 151A, General Laws Enclosed)**

The last day to appeal this decision to a Massachusetts District Court is thirty days from the mail date on the first page of this decision. If that thirtieth day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the business day next following the thirtieth day.

To locate the nearest Massachusetts District Court, see:
www.mass.gov/courts/court-info/courthouses

Please be advised that fees for services rendered by an attorney or agent to a claimant in connection with an appeal to the Board of Review are not payable unless submitted to the Board of Review for approval, under G.L. c. 151A, § 37.

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